Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 117

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	**CAUSE NO. A 05 CA 334 SS**
	§	
FULBRIGHT & JAWORSKI, LLP,	§	
	§	
Fulbright.	§	

PLAINTIFFS' REPLY TO FULBRIGHT'S RESPONSE TO PLAINTIFFS' MOTION TO ALTER OR AMEND THE JUDGMENT AND OBJECTIONS TO PLAINTIFFS' APPENDIX

TO THE HONORABLE COURT:

COMES NOW Plaintiffs Immunocept, LLC, Patrice Anne Lee, and James Reese Matson (collectively "Plaintiffs") and file this Reply to Fulbright's Response to Plaintiffs' Motion to Alter or Amend the Judgment and Objections to Plaintiffs' Appendix (the "Response") and would respectfully show the court as follows:

I. INTRODUCTION

Plaintiffs filed their Rule 59(e) Motion to Alter or Amend the Judgment (the "Motion") to specifically identify and move the Court to correct manifest factual and legal errors in its *grant* of summary judgment. Accordingly, in its Motion, Plaintiffs identified these specific errors and provided the Court with substantiation of their claims by reference to applicable evidence in the record. Rather than address the specific merits of Plaintiffs' argument, however, Fulbright has urged this Court to simply ignore

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Plaintiffs' Motion. Fulbright has offered no basis for this request other than the mere assertion that Plaintiffs' are just recycling their summary judgment arguments. A review of Plaintiffs' Motion, however, quickly reveals that this assertion is demonstrably false. Indeed, rather than rehashing any old arguments, Plaintiffs' Motion specifically singles out seven identified manifest factual and legal errors in the Court's summary judgment order, providing citations to evidence (where necessary), to substantiate the manifestly erroneous nature of the Court's Order. The only way for the Court to determine whether Plaintiffs' contentions have merit is to consider Plaintiffs arguments and substantiating evidence of manifest factual error. Plaintiffs thus respectfully request that his Court consider Plaintiffs' Motion and the attached Appendix on its merits. And on the basis of the merits, the Court should grant Plaintiffs' Motion and correct those errors of law and fact identified therein.

II. ARGUMENT AND AUTHORITIES

1. Plaintiffs Seek Reconsideration of the Court's Grant of Summary Judgment Because It Is Premised On Manifest Errors of Fact and Law

As Fulbright acknowledges, one of the express purposes of a Rule 59(e) motion is to permit a party to correct manifest errors of law or fact in a judgment issued by a court. *Templet v. HydroChem, Inc.*, 367 F.3d 473, 478 (5th Cir.2004); *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir.2002). Such a motion allows a party to "point to controlling decisions or data that the court overlooked that might alter the conclusion reached by the court." *Gerber v. Hoffmann-La Roche Inc.*, 392 F. Supp. 2d 907, 924 (S.D. Tex. 2005); *see also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995) (upholding district court's grant of a motion to reconsider where the movants had pointed to erroneously factual conclusions in the court's original order); *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996) ("Rule 59(e) allows a party to direct the district court's attention to . . . a manifest error of law or fact, and enables the court to correct its own errors and thus avoid unnecessary appellate procedures."). Whether or not to grant a Rule 59(e) motion is committed to the sound discretion of the court. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990).

Plaintiffs filed their Rule 59(e) motion for the specific purpose of identifying manifest factual and legal errors in the Court's summary judgment order. Specifically, Plaintiffs identified seven such manifest errors. In connection with this, Plaintiffs pointed to legal decisions and/or specific evidence demonstrating these factual and legal errors.[1] The identified errors and supporting corollary evidence included:

- **The Court's inaccurate representation of Alan MacPherson's opinion regarding the nature of the review necessary to discover Fulbright's malpractice.** This caricature of Mr. MacPherson's opinion was predicated on a inaccurate and out-of-context recitation of his deposition testimony. To illustrate this manifest factual error, and make clear Mr. MacPherson's actual opinions on the referenced issues, Plaintiffs submitted an affidavit by Mr. MacPherson.
- **The Court's imputation of knowledge from Mr. Felger to the Plaintiffs in spite of a genuine and material factual dispute concerning the scope of Mr. Felger's employment.** To make clear this manifest factual and legal error, Plaintiffs pointed to Texas law clearly providing that knowledge is only imputed from an agent to a principal if that knowledge is obtained while that agent is acting within the scope of his employment. Plaintiffs also pointed to unconsidered facts in the record demonstrating a genuine issue of material fact concerning the scope of Mr. Felger's employment and whether, given that scope, he would have discovered the malpractice at issue in this case.
- **The Court's grant of summary judgment on limitations grounds despite the fact that there was insufficient evidence to support a summary judgment**

[1] Notably, the bulk of the evidence contained in Plaintiffs' Appendix attached to their Rule 59(e) Motion was before the court on summary judgment. The principle exceptions to this are the affidavits of Jim Malackowski and Alan MacPherson. However, as described herein, these affidavits do not elicit new facts or make claims to having uncovered new evidence. Rather, they provide clarification concerning certain opinions inaccurately attributed to them by the district court.

grant of negligence against Mr. Felger. To make clear this manifest factual and legal error, Plaintiffs pointed to unconsidered record evidence demonstrating a genuine issue of material fact concerning Mr. Felger's negligence, including Fulbright's own admission that Mr. Felger did not commit negligence.

- **The Court's mischaracterization of the type of damages Plaintiffs were seeking, and corresponding failure to apply the proper legal standard to Plaintiffs' damage calculations.** To illustrate this manifest factual and legal error, Plaintiffs' submitted an affidavit of Jim Malackowski, who made clear that his calculated damage numbers ***were not*** lost profits estimates.
- **The Court's inaccurate factual assertion that Mr. Malackowski himself has admitted that his damage opinion is grounded on a serious assumptions which "are a source of great uncertainty."** To illustrate this manifest factual error, Plaintiffs pointed to Mr. Malackowski's affidavit, wherein he makes clear that he has never admitted, nor does he believe, such a thing. Plaintiffs also pointed to unconsidered record evidence demonstrating that Fulbright's own experts and other witness similarly rejected the idea that Mr. Malackowski's assumptions are a source of great uncertainty, noting that they were in substantial agreement with Mr. Malackowski on nearly all of the major market variables that went into his analysis.
- **The Court's inaccurate factual assertion that obtaining FDA approval constituted an additional risk associated with Plaintiffs' technology, separate and distinct from the question of whether the device was efficacious.** To illustrate this manifest factual error, Plaintiffs pointed to deposition testimony of Fulbright's own FDA expert witness, who frankly acknowledged that the question of efficacy and the question of FDA approval were one and the same.
- **The Court's erroneous factual assumption that the only studies pointing to the efficacy of the technology are the Plaintiffs' original animal study.** To illustrate this manifest factual error, Plaintiffs pointed to record evidence from the testimony of Dr. Rinaldo Bellomo, establishing that Plaintiffs' assertion of efficacy is backed up by literally dozens of studies, most involving live, human beings and actual human blood.

In its Response, Fulbright contends that all Plaintiffs have done in their Motion is "recycled arguments" and "retread old ground." However, this contention amounts to nothing more than mere assertion. Fulbright points to no "recycled" arguments, no "retread old ground" – indeed, Fulbright points to nothing whatsoever supporting its contention that Plaintiffs are rehashing their summary judgment response.

This is largely because Fulbright has nothing to point to. As discussed above, in its Rule 59(e) Motion, Plaintiffs specifically identified and expressly moved to correct manifest errors of fact and law in the Court's grant of summary judgment. This is the very purpose of a Rule 59(e) motion. Fulbright may contend that no such manifest errors exist. But Fulbright's claim that Plaintiffs' motion is merely a recycled version of Plaintiffs' earlier summary judgment response is demonstrably false. As such, the Court may properly consider Plaintiffs' Motion.

2. Plaintiffs Rule 59(e) Motion Has Merit and Should Be Granted

As more fully described in its original Rule 59(e) Motion, the Court's *grant* of summary judgment in favor of Fulbright is premised on several manifest errors of fact and law. The manifestly erroneous nature of these premises is demonstrated by reference to the specific record evidence and testimony cited by Plaintiffs in their Motion. For the reasons described in that Motion, Plaintiffs urge the Court to reconsider these premises and correct them.

3. The Only Way for the Court to Determine Whether Such Manifest Errors Exist is to Consider the Evidence Submitted by Plaintiffs

In a further attempt to get the Court simply to ignore Plaintiffs' argument that the Court's summary judgment is premised on manifest errors of fact and law, Fulbright urges the Court to strike Plaintiffs' Appendix to its Motion and "exclude it from consideration by the Court." This position, however, cannot be squared with the acknowledged purpose of a Rule 59(e) motion, which expressly permits a party to identify, and urge the court to correct, manifest errors of law or fact in a judgment by "point[ing] to controlling decisions or data that the court overlooked that might alter the conclusion reached by the court." *Gerber,* 392 F. Supp. 2d at 924; *see also Templet,* 367 F.3d at, 478; *In re Transtexas Gas Corp.*, 303 F.3d at 581. It is axiomatic that the only way a party could point to such a manifest factual error is by attaching such "overlooked" evidence to its Motion. Further, the only way a court could determine whether the party's Rule 59(e) claim of manifest factual error was legitimate would be to consider that submitted evidence. In other words, without considering the evidence of manifest error offered by a party, it would be logically impossible for a Court to determine whether such manifest error actually existed.

Unsurprisingly, Fulbright can offer no authority in support of its untenable position that in determining whether its judgment contains manifest errors of fact or law, a Court is not permitted to consider evidence of any such errors. In fact, as discussed above, in order to dispose of Plaintiffs' motion – that is, in order to determine whether Plaintiffs' claims of manifest factual and legal errors are valid – the Court necessarily ***must*** consider such evidence. And considering such evidence is precisely what other courts do when confronted with similar claims of manifest error on a motion for reconsideration. *See e.g., Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995) (affirming a district court's grant of a motion for reconsideration after the party had pointed the Court to factual evidence the Court had failed to consider in its decision); *Marks v. Shaw Constructors*, No. CIV.A. 00-3203, 2001 WL 1561801 (E.D. La., Dec. 7, 2001) (granting a party's Rule 59(e) motion for reconsideration of a summary judgment order after the movants directed the court to evidence demonstrating a manifest error of fact in summary judgment decision).

The two cases Fulbright ostensibly offers in support of their contention in reality provide no such support. In *Waltman v. Int'l Parper Co.,* the court concluded that the district court had property declined to consider evidence submitted by party as part of a Rule 59(e) motion. 875 F.2d 468, 474 (5th Cir 1989). Significantly, however, the express basis for the *Waltman* court's conclusion was the fact that the party's Rule 59(e) Motion had not "sought to correct a manifest error of law or fact" in the district court's judgment, but rather was merely presenting the Court with new evidence the party could have earlier presented at summary judgment. *Id.* In contrast, as discussed above, the evidence Plaintiffs submitted here as part of their Rule 59(e) Motion was specifically calculated to identify manifest errors of fact and law in the Court's Order, not to support any recycled previous arguments or introduce new evidence to the Court.

Fulbright's only other cited case, *Matador Petroleum Corp v. St. Paul Surplus Lines Ins. Co.,* 174 F.3d 653, 658 n.1 (5th Cir. 1999), is similarly inapposite. There, the party filing the Rule 59(e) Motion had attached evidence discovered ***after*** the Court's issuance of summary judgment. *Id.* The issue in that case was thus whether this "newly discovered evidence" was available to the party before the summary judgment issued. *Id.* Here, in contrast, Plaintiffs are not asserting that the Court should consider evidence acquired after its summary judgment ruling. Rather, Plaintiffs' contention is that the Court's ruling contains manifest errors of fact and law and Plaintiffs' submitted evidence was specifically designed to demonstrate these errors. Once again, the only way for a Court to determine whether such errors exist here is to consider the submitted evidence.

4. **Because Resolving the Arguments Raised by Plaintiffs in Their Rule 59(e) Motion Necessarily Requires a Consideration of Their Submitted Evidence, the Court's Order On Plaintiff's Motion Should Expressly State that Such Evidence was Considered**

In the proposed order attached to Fulbright's Response, Fulbright includes language indicating that in denying Plaintiffs' Motion, the Court did not consider the evidence contained in Plaintiffs' Appendix. For the reasons discussed above, however, any decision by this Court concerning Plaintiffs' Motion necessarily requires the Court to examine the evidence Plaintiffs point to as substantiating their claims of manifest error. Accordingly, no matter the ultimate decision reached by the Court concerning Plaintiffs' Motion, the resulting order should reflect that fact that the Court considered the motion and the attached Appendix. Plaintiffs thus respectfully request that any order granting or denying or Plaintiffs' Motion specifically state that the Court considered the Appendix.

III. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request this Court to grant its Motion to Alter or Amend the Judgment and reverse its grant of summary judgment in favor of Fulbright. Additionally, Plaintiffs respectfully request this Court overrule Fulbright's objections to Plaintiffs' Appendix. Finally, Plaintiffs respectfully request that the Court's Order **granting** or **denying** Plaintiffs' Motion specifically state that the Court had considered the evidence in Plaintiffs' Appendix.[2]

[2] For the convenience of the Court, Plaintiffs have attached proposed orders granting and, alternatively, denying Plaintiffs' Motion.

Respectfully submitted,

Michael P. Lynn, P.C.
State Bar No. 12738500
Jeffrey M. Tillotson, P.C.
State Bar No. 20039200
John Volney
State Bar No. 24003118
Jeremy A. Fielding
State Bar No. 24040895
LYNN TILLOTSON & PINKER, LLP
750 N. St. Paul Street, Suite 1400
Dallas, Texas 75201
(214) 981-3800 Telephone
(214) 981-3839 Facsimile

ATTORNEYS FOR PLAINTIFFS IMMUNOCEPT, LLC

PATRICE ANN LEE

JAMES REESE MATSON

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served *via facsimile* on this the 19th day of April, 2006:

David J. Beck, Esq.
Geoff Gannaway, Esq.
BECK, REDDEN & SECREST, L.L.P.
One Houston Center
1221 McKinney Street, Suite 4500
Houston, Texas 77010
(713) 951-3700 Telephone
(713) 951-3720 Facsimile

Attorneys for Fulbright & Jaworski, LLP

Jeremy A. Fielding